

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JASON L. DEVANEY,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
Defendant.

No. CV- 13-278-JPH

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 23 and 25. On May 19, 2014 Plaintiff filed a reply. ECF No. 26. The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the parties' briefs, the court **grants** defendant's motion for summary judgment, **ECF No. 25**.

**JURISDICTION**

Devaney applied for disability insurance benefits (DIB) and supplemental

1 security income (SSI) benefits on August 3, 2010, alleging onset beginning March  
2 10, 2006 (Tr. 194-212). Benefits were denied initially and on reconsideration (Tr.  
3 139-42, 145-58). ALJ James W. Sherry held a hearing April 10, 2012. Devaney  
4 and a vocational expert testified (Tr. 52-84). The ALJ issued an unfavorable  
5 decision May 16, 2012 (Tr. 26-39). The Appeals Council denied review June 4,  
6 2013 (Tr. 1-3). The matter is now before the Court pursuant to 42 U.S.C. § 405(g).  
7 Plaintiff filed this action for judicial review on July 31, 2013. ECF No. 1, 5.

### 8 **STATEMENT OF FACTS**

9 The facts have been presented in the administrative hearing transcript, the  
10 ALJ's decision and the parties' briefs. They are briefly summarized here and as  
11 necessary to explain the court's decision.

12 Devaney was 32 years old at onset and 38 at the first hearing. He quit school  
13 in the twelfth grade but earned a GED. He worked as a custodian. He has not  
14 worked since 2007 because he suffers stomach problems, neck, back and shoulder  
15 pain, headaches, breathing and sleep problems, and depression. Five days a week  
16 he naps for two to three hours because of pain. He can sit for two hours and stand  
17 for an hour (Tr. 59, 62-67, 69, 71-77, 226, 278).

### 18 **SEQUENTIAL EVALUATION PROCESS**

19 The Social Security Act (the Act) defines disability as the "inability to  
engage in any substantial gainful activity by reason of any medically determinable

1 physical or mental impairment which can be expected to result in death or which  
2 has lasted or can be expected to last for a continuous period of not less than twelve  
3 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
4 plaintiff shall be determined to be under a disability only if any impairments are of  
5 such severity that a plaintiff is not only unable to do previous work but cannot,  
6 considering plaintiff’s age, education and work experiences, engage in any other  
7 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423  
8 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both  
9 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
10 (9<sup>th</sup> Cir. 2001).

11 The Commissioner has established a five-step sequential evaluation process  
12 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
13 one determines if the person is engaged in substantial gainful activities. If so,  
14 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
15 decision maker proceeds to step two, which determines whether plaintiff has a  
16 medically severe impairment or combination of impairments. 20 C.F.R. §§  
17 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment  
18 or combination of impairments, the disability claim is denied.

19 If the impairment is severe, the evaluation proceeds to the third step, which  
compares plaintiff’s impairment with a number of listed impairments

1 acknowledged by the Commissioner to be so severe as to preclude substantial  
2 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.  
3 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
4 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
5 not one conclusively presumed to be disabling, the evaluation proceeds to the  
6 fourth step, which determines whether the impairment prevents plaintiff from  
7 performing work which was performed in the past. If a plaintiff is able to perform  
8 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
9 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity  
10 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and  
11 final step in the process determines whether plaintiff is able to perform other work  
12 in the national economy in view of plaintiff's residual functional capacity, age,  
13 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
16 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
17 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
18 met once plaintiff establishes that a physical or mental impairment prevents the  
19 performance of previous work. The burden then shifts, at step five, to the  
Commissioner to show that (1) plaintiff can perform other substantial gainful

1 activity and (2) a “significant number of jobs exist in the national economy” which  
2 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

### 3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a  
5 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the  
6 Commissioner’s decision, made through an ALJ, when the determination is not  
7 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,  
8 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
9 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be  
10 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*  
11 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g). Substantial  
12 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
13 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
14 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence “means such evidence  
15 as a reasonable mind might accept as adequate to support a conclusion.”  
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch  
17 inferences and conclusions as the [Commissioner] may reasonably draw from the  
18 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir.  
19 1965). On review, the Court considers the record as a whole, not just the evidence  
supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,

1 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

2 It is the role of the trier of fact, not this Court, to resolve conflicts in  
3 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
4 interpretation, the Court may not substitute its judgment for that of the  
5 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
6 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
7 set aside if the proper legal standards were not applied in weighing the evidence  
8 and making the decision. *Browner v. Secretary of Health and Human Services*, 839  
9 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
10 administrative findings, or if there is conflicting evidence that will support a  
11 finding of either disability or nondisability, the finding of the Commissioner is  
12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

### 13 **ALJ'S FINDINGS**

14 ALJ Sherry found Devaney was insured through December 31, 2013 (Tr. 26,  
15 28). At step one, the ALJ found Devaney did not work at SGA levels after onset  
16 (Tr. 28). At steps two and three, the ALJ found he suffers from lumbar  
17 degenerative disc disease (DDD) with stenosis; bilateral shoulder  
18 acromioclavicular (AC) joint and glenohumeral joint degeneration, right more than  
19 left; lumbago and minor cervical degenerative changes, impairments that are  
severe but do not meet or medically equal a listed impairment (Tr. 28-29). The

1 ALJ found Devaney less than fully credible (Tr. 31). He found Plaintiff is able to  
2 perform a range of light work (Tr. 29). At step four, relying on a vocational  
3 expert's testimony, the ALJ found Devaney is unable to perform his past relevant  
4 work (Tr. 37, 77-79). At step five, again relying on the VE, the ALJ found  
5 Devaney can perform other jobs such as laundry worker, parking lot attendant and  
6 housekeeper/cleaner (Tr. 37-38, 79). The ALJ concluded Devaney was not  
7 disabled from onset through date of the decision (Tr. 38).

### 8 ISSUES

9 Devaney alleges the ALJ erred when he assessed credibility and the medical  
10 evidence. ECF No. 23 at 10-11. The Commissioner asks the court to affirm,  
11 alleging the ALJ applied the correct legal standards and the decision is supported  
12 by substantial evidence. ECF No. 25 at 2.

### 13 DISCUSSION

#### 14 A. Credibility

15 Devaney challenges the ALJ's credibility assessment. ECF No. 23 at 10-11.

16 To aid in weighing the conflicting medical evidence, the ALJ evaluated  
17 Devaney's credibility. Credibility determinations bear on evaluations of medical  
18 evidence when an ALJ is presented with conflicting medical opinions or  
19 inconsistency between a claimant's subjective complaints and diagnosed condition.  
See *Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005). It is the province of the

1 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039  
2 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be supported by specific cogent  
3 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent  
4 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's  
5 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup>  
6 Cir. 1995).

7 The ALJ's reasons are clear and convincing.

8 The ALJ notes Devaney's allegations exceeded objective findings during  
9 examinations and on radiology reports (Tr. 31-33; Tr. 272-73, 282, 284, 289, 293,  
10 297-98, 305, 309, 323, 329, 346, 374, 383, 415 (MRI of right shoulder and exam of  
11 both shoulders "quite benign"); 436, 473)). Statements have been inconsistent (Tr.  
12 33). Devaney testified headaches cause significant problems, but this is not well  
13 documented in the medical record. The ALJ states Devaney did not mention  
14 headaches to providers until January 2012 (Tr. 34, citing Tr. 472). This is error, but  
15 harmless. The record shows Devaney complained of headaches once in January  
16 2011(said neck pain seems to trigger headaches) and once in May 2011 (complains  
17 of migraines) (Tr. 339, 415). He testified he suffers headaches daily and they last  
18 all day even with taking pain medication (Tr. 66-67). The ALJ's reasoning is  
19 correct: the record does not support Devaney's testimony he suffers severe  
headaches daily since he did not report this to his treatment providers.

1 Devaney testified he was not helped and was actually made worse by  
2 physical therapy, but records contradict this (Tr. 33, 65, 75, 302, 335, 339).  
3 Devaney testified he sometimes blacks out yet he has also failed to report syncope  
4 or dizziness to providers (Tr. 34, 68, *see generally* Ex. 3F; Tr. 304, 323, 328, 382,  
5 388, 396, 434). He testified he requires daily naps lasting several hours; similarly,  
6 he never mentioned this to treatment providers (Tr. 35, 64). Devaney denied  
7 problems with drugs or alcohol. The record clearly shows he smokes marijuana.  
8 There is a reference to a medical marijuana card, but Devaney failed to state in his  
9 testimony that he has one. There is evidence of drug seeking behavior (Tr. 35, 74,  
10 271-72, 278, 281-82, 285-86, 288, 292, 296, 322, 370-72, 434, 472). There is some  
11 evidence Devaney has not always consistently followed through with medical  
12 treatment, including taking prescribed medication (Tr. 34, 271, 273, 277, 279, 288-  
13 289, 296, 339, 388, 396). At the hearing Devaney did not mention activities such  
14 as walking for exercise five times a week but repeatedly reported this activity to  
15 providers. He told a doctor he fell off of a deck while directing traffic at his  
residence (Tr. 35, referring to Tr. 272, 278, 285-86, 293, 297).

16 The ALJ's reasons are clear, convincing and supported by the record. *Burch*  
17 *v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005)(lack of medical evidence is properly  
18 considered as long as it is not the sole basis for discounting pain testimony, daily  
19 activities are properly considered); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup>

1 Cir. 2002)(proper factors include inconsistencies in claimant's statements and  
2 inconsistencies between statements and conduct); *Fair v. Bowen*, 885 F.2d 597,  
3 603 (9<sup>th</sup> Cir. 1989)(unexplained noncompliance with medical treatment is properly  
4 considered).

5 *B. Weighing opinion evidence*

6 Devaney alleges the ALJ should have given more credit to the opinions of  
7 Drs. Candelaria and Barrett. ECF No. 23 at 10-12, referring to Tr. 266-70, 430-33.  
8 The Commissioner answers that the ALJ's reasons for rejecting these contradicted  
9 opinions are specific and legitimate. ECF No. 25 at 11-17.

10 Treating physician Gary M. Candelaria, D.O., assessed Devaney's condition  
11 on April 23, 2010, about four years after onset. Dr. Candelaria opined he was  
12 unable to work even at a sedentary level due to problems with a learning disability,  
13 lumbar stenosis and lumbar degenerative joint disease (DJD)(ability to work is  
14 zero hours per week). Dr. Candelaria opined Devaney would have difficulty with  
15 comprehension and following instructions. Back pain limits lifting to less than ten  
16 to fifteen pounds (Tr. 266-67). He expected back problems to last six months,  
17 noted Devaney awaited a neurosurgery evaluation and may benefit from physical  
18 therapy or injections. He opined further assessment of Devaney's learning  
19 disability was needed (Tr. 36, 266-270, 271-301).

The ALJ rejected this contradicted opinion because it was inconsistent with

1 the medical evidence, including treatment notes from Candelaria's own clinic, the  
2 Whitman Medical Group. Exams showed that objective findings were largely  
3 benign, with no range of motion limitations, no motor strength deficits, no gait  
4 impairment and normal straight leg raises when tested (*see e.g.*, Tr. 283-84, 289).  
5 The ALJ points out Dr. Candelaria had no documentation of a learning disorder.  
6 The doctor's notes indicate there is a "[k]nown learning disability. This has been  
7 documented by full comprehensive psychological and mental capacity testing."  
8 The ALJ is correct that Dr. Candelaria's records do not contain any documentation,  
9 and he (Dr. Candelaria) opined further testing should be done (Tr. 36, 267, 288).  
10 Test results elsewhere in the record show average IQ scores (Tr. 34, 452).

11 More importantly, a lifelong learning disorder causing difficulty with  
12 comprehension and following instructions is inconsistent with Devaney's ability to  
13 work for many years, as the ALJ points out. Devaney worked fulltime as a janitor  
14 at a college for 13 years (Tr. 227). The VE testified limitations associated with  
15 such a disorder would not preclude other work at step five (Tr. 34-35, 38, 62, 212-  
16 19, 223 (noting no perceived reading difficulties during a 48 minute telephone  
17 interview; claimant was on time, and prepared with application and medical  
18 information), Tr. 266). Any error is harmless because Delaney fails to identify any  
19 more restrictive limitations caused by a learning disorder that the ALJ should have  
included. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9<sup>th</sup> Cir. 2007)(error at step two

1 harmless when ALJ considers limitations caused by nonsevere impairments).

2 The ALJ observes Dr. Candelaria's assessed limitation of "walking only for  
3 brief periods" is inconsistent with Devaney's reported functioning, including  
4 reports he walked for exercise five days a week (Tr. 31, 36, 267, 272, 282, 289,  
5 293-94, 296-98). The ALJ's reasons are specific, legitimate and supported by  
6 substantial evidence.

7 Devaney alleges the ALJ should have credited the limitations assessed by  
8 Andrea J. Barrett, M.D. On January 7, 2011. ECF No. 23 at 11-12. She opined  
9 Devaney is unable to perform even sedentary work due to back problems and  
10 bilateral shoulder instability.

11 The ALJ notes Dr. Barrett admitted she does not treat Devaney for back  
12 problems. Her opinion is also inconsistent with other evidence, such as Devaney's  
13 reported activities. She observed his demonstration of physical therapy exercises  
14 was "very exaggerated and broad" (Tr. 36, 336-66, 430-33).

15 The ALJ may properly reject a physician's contradicted opinion that is  
16 inconsistent with the record as a whole. *Orn v. Astrue*, 495 F.3d 625, 631 (9<sup>th</sup> Cir.  
17 2007)(citation omitted). Opinions premised on Plaintiff's subjective complaints  
18 and testing within Plaintiff's control is properly given the same weight as  
19 Plaintiff's own credibility. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
2001).

1 Devaney alleges the ALJ should have found at step two he suffers from the  
2 severe impairment of a learning disorder. He is incorrect. The ALJ properly found  
3 a learning disorder did not significantly limit Delaney's ability to perform basic  
4 work activities, the appropriate analysis for finding an impairment severe at step  
5 two. *See Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9<sup>th</sup> Cir. 2001). As noted  
6 the ALJ observed Devaney was able to work for many years despite an alleged  
7 learning disability, and the VE testified limitations associated with such a disorder  
8 would not preclude other work at step five (Tr. 38). There was no harmful error.

9 It is the ALJ's province to resolve ambiguity in the record, such as the  
10 contradicted medical opinions Devaney cannot perform even sedentary work.  
11 Although Devaney alleges the ALJ should have weighed the evidence differently,  
12 the ALJ is responsible for reviewing the evidence and resolving conflicts or  
13 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989).

14 The ALJ's reasons for rejecting more dire limitations are specific, legitimate  
15 and supported by substantial evidence. The ALJ assessed an RFC that is consistent  
16 with the record as a whole. There was no harmful error.

## 17 CONCLUSION

18 After review the Court finds the ALJ's decision is supported by substantial  
19 evidence and free of legal error.

**IT IS ORDERED:**

1 1. Defendant's motion for summary judgment, **ECF No. 25**, is **granted**.

2 2. Plaintiff's motion for summary judgment, ECF No. 23, is denied.

3 The District Executive is directed to file this Order, provide copies to  
4 counsel, enter judgment in favor of defendant, and **CLOSE** the file.

5 DATED this 9th day of June, 2014.

6  
7 s/James P. Hutton

8 JAMES P. HUTTON

9 UNITED STATES MAGISTRATE JUDGE  
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